Aldge David -487

Motion to dismiss

Dec 8

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 611.

MAGDALENA A. ZELLER, WIDOW OF F. C. ZELLER, DECEASED, HENRIETTA ZELLER, MINOR HEIR, BY HER TUTRIX, M. A. ZELLER, C. J. ZELLER, GEORGE ZELLER, LOUIS ZELLER, AND MAGDALENA, WIFE OF P. BETZ, HEIRS OF F. C. ZELLER, DECEASED, PLAINTIFFS IN ERROR,

vs.

EDGAR A. SWITZER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

FILED SEPTEMBER 27, 1875.

SUPREME COURT OF THE UNITED STATES.

No. 611.

MAGDALENA A. ZELLER, WIDOW OF F. C. ZELLER, DECEASED, HENRIETTA ZELLER, MINOR HEIR, BY HER TUTRIX, M. A. ZELLER, C. J. ZELLER, GEORGE ZELLER, LOUIS ZELLER, AND MAGDALENA, WIFE OF P. BETZ, HEIRS OF F. C. ZELLER, DECEASED, PLAINTIFFS IN ERROR,

VS.

EDGAR A. SWITZER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

INDEX.

	Original.	Print.
Petition	1	1
Citation waived	4	3
Motion to transfer bond	4	3
Citation on Mrs. M. A. Zeller and returns	5	3
Answer	6	4
Peremptory exception and order	7	5
Order fixing exception for trial—"minutes"	8	5
Note of evidence	8	6
Cause submitted—"minutes"	9	6
Judgment	9	6
Petition for appeal and order	9	6
Bond of appeal	10	7
Citation of appeal and return	11	8
RECORD, 16,926, FIFTH DISTRICT COURT.		
Petition and affidavit	12	8
Bill for services	13	9
Order for provisional seizure	14	9
Order fixing amount of bond for release	14	9
Citation to Mrs. Heinn and return	14	10
Citation to John Heinn	14	10
Consent to transfer case	15	10
Bond releasing steamboat Frolic	15	11

	Original.	Print.
Endorsement on reverse of above bond	16	11
Answer	16	12
Rule to set aside provisional seizure	17	12
Answer	17	12
Rule to show cause why provisional seizure should not be set aside and returned	19	13
Supplemental petition and order	19	13
Note for $870 to E. A. Switzer from J. Heinn	20	14
Testimony of R. P. McQueen for plaintiff	20	14
Citation to supplemental petition and return	21	15
Exception to supplemental petition	21	15
Supplemental and amended answer of Mrs. Heinn	22	15
Document A, receipt by Switzer for $400	22	16
Rule for new trial and return	22	16
Original and amended answer of John Heinn	23	16
Peremptory exception of defendants	23	17
Testimony of E. A. Switzer	24	17
Motion to make E. E. Norton, assignee, party to suit	24	18
Motion for new trial	25	18
Motion for making E. E. Norton, assignee, party to suit and return	25	18
Note of evidence	25	18
Judgment	25	18
Motion to transfer bond to plaintiff	26	19
Rule to set aside appeal and returns	27	19
Trial of rule continued	27	20
Note of evidence	27	20
Testimony of W. Wood's security on appeal bond	27	20
Judgment on rule	28	20
Certificate of clerk, second judicial district court	28	21
SUPREME COURT.		
Cause submitted—"minutes"	29	21
Judgment—"minutes"	29	21
Opinion of the court	30	22
Petition for rehearing	30	22
Rehearing refused—"minutes"	32	23
Writ of error	32	23
Bond for writ of error	34	24
Consent of plaintiff	36	25
Certificate of clerk of supreme court	37	25
Certificate of Chief Justice Ludeling	37	26
Certificate of clerk of supreme court	38	26
Writ of error	39	26
Citation	40	27

a 3508. State of Louisiana, second judicial district court, parish of Jefferson.

EDGAR A. SWITZER, APPELLANT,
vs.
MRS. M. A. ZELLER, APPELLEE. } No. 3878.

Egan and Whittemore, for appellant; Brice, Race, Foster, and Merrick, for appellee.

Transcript of appeal returnable in the honorable the supreme court of State of Louisiana, on the first Monday in November, A. D. 1871.

Supreme court of La.

Filed Nov. 4th, 1871.
(Signed) M. P. JULIAN,
Deputy Clerk.

1 STATE OF LOUISIANA,
Parish of Jefferson:

Second judicial district court in and for the parish of Jefferson.

EDGAR A. SWITZER
vs.
MRS. MAGDALENA A. ZELLER ET ALS. } No. 3878.

Petition.—(*Filed in 2d jud. d. ct., October 8th,* 1870, *and in the 5th dist. ct. Aug.* 31*st*, 1866.)

To the hon. the second judicial district court in and for the parish o Jefferson, State of Louisiana:

The petition of Edgar A. Switzer, of St. Louis, Missouri, respectfully represents that Mrs. Magdalena A. Zeller, widow in community of F. C. Zeller; Henrietta Zeller, minor heir of F. C. Zeller, represented by her mother and natural tutrix, said widow Magdalena A. Zeller; C. J. Zeller, George Zeller, Louis Zeller, and Magdalena Zeller, (wife of P. Betz,) major heirs of F. C. Zeller, are justly and truly indebted jointly to petitioner in the full sum of eight hundred and seventy dollars, with legal interest from March 6th, 1866, until paid, and costs of suit, in the respective portions hereinafter set forth, for this, to wit:

That on the 22d day of April, 1870, petitioner recovered judgment in the fifth district court for the parish of Orleans for the aforesaid sum, interest and costs, and with privilege on the steamboat Frolic, said judgment having been signed on the 28th of April, 1870, in suit No. 16926, of the docket of said fifth district court, entitled E. A. Switzer vs. Steamboat Frolic & Owners, Mary Heinn and husband, John Heinn, all of which more fully appears by the record hereto annexed and made part hereof.

2 Petitioner further represents that, previous to the rendition of said judgment, a writ of provisional seizure issued at the instance of petitioner, the plaintiff in said suit, and said steamboat Frolic, the property of defendants in said suit was seized thereunder, and that said steamboat Frolic was released from said seizure according to law, upon

the execution of bond for fifteen hundred dollars, with said F. C. Zeller as security, dated Sept 4, 1866, and conditioned as the law requires, as appears by the bond in the aforesaid record, and hereto annexed and made part hereof.

Petitioner further represents that said bond has been duly transferred to him, and that the said F. C. Zeller, the surety thereon, has died since signing the same, and that his succession has been opened in the parish court in and for the parish of Jefferson, with the said Mrs. Magdalena A. Zeller, as widow in community, administratrix and natural tutrix of the said minor heir, Henrietta Zeller, being No. 185 of the docket thereof.

Petitioner further represents that the property of said succession has been partitioned, and that said Mrs. Magdalena A. Zeller, administratrix, etc., has filed her final account in said succession, which account has been approved and homologated by final judgment of said parish court, and the funds of said succession ordered to be distributed in accordance therewith.

Petitioner further represents that his aforesaid claim was not placed upon said account, and that his only recourse is to sue the said widow in community and heirs for their respective portions, as aforesaid.

3 Petitioner further represents that the amounts awarded to said parties by the above said account and judgment, after payment of the debts placed upon said account, were as follows, to wit: $2,328.87½ to Mrs. Magdalena A. Zeller, as widow in community of F. C. Zeller,

" 465.77½ to Henrietta, miror heir
" 465.77½ to C. J. Zeller, major "
" 465.77½ " George " " "
" 465.77½ " Louis " " "
" 465.77½ " Magdalena " (wife of P. Betz.)

The widow in community receiving one-half of the amount of the inventory and the five sole heirs, each one-tenth of the amount of the inventory, after payment of the debts placed on said account.

Petitioner further represents that said Mary Hienn and husband, John Hienn, defendants in the said suit, in said fifth district court, became bankrupts pending said suit and before the rendition of the judgment, having applied to be declared bankrupts on the 9th of April, 1868, and been discharged on the 27th of January, 1869, by the United States district court at New Orleans, sitting in bankruptcy, in No. 383 of the docket of said court, whereby it became useless and impossible to issue execution for the payment of the said judgment of said fifth district court, and the liability of F. C. Zeller became fixed therefor.

Wherefore petitioner prays that, in consideration of the premises, the said Mrs. Magdalena A. Zeller, widow in community of said F. C. Zeller; Henrietta Zeller, minor heir of said F. C. Zeller, through her mother and natural tutrix, the said widow Magdalena A. Zeller; C. J. Zeller, George Zeller, Louis Zeller, and Magdalena Zeller, (wife of P. Betz,) major heirs of said F. C. Zeller, and P. Betz, husband of said Magdalena Zeller, be severally cited to appear and answer this petition, and, after due proceedings had, that they be condemned jointly to pay petitioner

4 the aforesaid sum of eight hundred and seventy dollars, with legal interest from March 6th, 1866, until paid, and costs of suit, in their respective shares or proportions, to wit: Mrs. Magdalena A. Zeller, widow in community of F. C. Zeller, one-half; Henrietta Zeller, minor heir of F. C. Zeller, through her mother and natural tutrix, said widow Magdalena A. Zeller, one-tenth; C. J. Zeller, major heir of F. C.

Zeller, one-tenth; George Zeller, major heir of F. C. Zeller, one-tenth; Louis Zeller, major heir of F. C. Zeller, one-tenth; Magdalena Zeller, major heir of F. C. Zeller and wife of P. Betz, one-tenth; and petitioner prays for general and equitable relief and all costs of suit.

(Signed) B. EGAN AND E. N. WHITTEMORE,
Attorneys.

Citation.

Service of the petition and citation waived for C. J. Zeller, George Zeller, Louis Zeller, and Magdalena Zeller, wife of P. Betz, and I. Betz, her husband.

October 18, '70.

(Signed) BRICE & MITCHELL, *Attys.*

Motion to transfer bond.—(*Filed October 3d*, 1870.)

To the hon. the second judicial district court, in and for the parish of Jefferson:

On motion of B. Egan and E. N. Whittemore, attys. for E. A. Switzer, and on suggesting to the court that in the case of E. A. Switzer vs. St'boat Frolic and Owners, Mary Hienn and husband, John Hienn, originally No. 2880 of the docket of the second judicial district court in and for the parish of Jefferson, and subsequently No. 16926 of the docket of the fifth district court for the parish of Orleans, defendant therein executed a bond in said cause for the release of steamer Frolic, with F. C. Zeller as surety, in favor of S. Kerner, sheriff of the parish of Jefferson, said bond being dated Sept. 4, 1866, and for the amount of fifteen hundred dollars; and on further suggesting to the court that said Sheriff Kerner has since gone out of office and ceased to be sheriff: therefore, it is ordered by the court that the present sheriff of the parish of Jefferson, successor to S. Kerner, transfer said bond to plaintiff, E. A. Switzer, and that the same is transferred nunc pro tunc.

Carrollton, La., October 3d, 1870.

(Signed) DON A. PARDEE,
Judge 2d Jud. Dist. La.

Citation.

THE STATE OF LOUISIANA,
Parish of Jefferson:

Second judicial district court.

EDGAR A. SWITZER,
vs.
MRS. MAGDALENA A. ZELLER ET AL. } No. 3878.

Mrs. Magdalena A. Zeller, widow in community of F. C. Zeller, and as natural tutrix of the minor Henrietta Zeller:

You are hereby summoned to comply with the demand contained in the petition, of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the second judicial district court in the parish of Jefferson in ten days after the service hereof.

Witness, the Hon Don. A Pardee, judge of the said court, this 10th day of October, in the year of our Lord 1870.

(Signed) F. J. LAIZER,
Dy. Clerk.

The above citation, with a certified copy thereof and of petition, were received by the sheriff of the parish of Jefferson, the 10th day of October, A. D. 1870.

(Signed) F. M. SÉCARD,
Dy. Sh'ff.

Personal service.

6 On the 11th day of October, A. D. 1870, I made service of the copies of the petition and citation above mentioned by delivering them to Mrs. Magdalena A. Zeller, widow of F. C. Zeller, in person. Returned same day.

(Signed) LEN. WILLIAMS,
Dy. Sheriff.

Answer.—Filed Nov'r 25th, 1870.

EDGAR A. SWITZER
vs.
MRS. MAGDALENA ZELLER ET AL.

Hon. Don A. Pardee, judge of the second judicial district court, parish of Jefferson, La.:

The defendants in the above-entitled cause come, and, for answer to allegations of plaintiff's petition, say they deny generally and specially each and every allegation in plaintiff's therein contained.

These defendants, further answering, say that said supposed bond sued on in this case cannot be enforced against these defendants for the following reasons, viz:

1st. The said second judicial district court of the State of Louisiana, where said suit was commenced, was without jurisdiction to provisionally seize said steamboat Frolic for the cause set forth in said original petition, such jurisdiction being exclusively vested in the courts of admiralty and maritime jurisdiction of the United States, and said seizure was in violation of the jurisdiction of said courts of the United States, and the Constitution and laws of the United States, and all proceedings under said provisional seizure, including said pretended bond, are void.

2d. Because said pretended bond and the conditions thereof was not in conformity with the laws of Louisiana, and is more onerous than said supposed laws on the subject of the seizure and proceedings in rem of ships, &c.

3d. Because said plaintiff has not taken the necessary steps to
7 make his said pretended demand out of said steamboat Frolic, said Heinn and husband, nor followed the same in said pretended bankrupt proceedings to which he pretends to have been a party.

4th. Because after the supposed execution of the pretended bond in this case in said second judicial district court for the parish of Jefferson, where said cause of E. A. Switzer vs. The steamboat Frolic and owners, was commenced, said plaintiff, with the consent of M. Grivot, atty.,

removed said case to the 5th dist. court of New Orleans, another jurisdiction, not contemplated in said bond, without the consent and against the wishes of said deceased, and then, by an amended petition, set up a new cause of action and obtained said supposed judgment ex parte against E. E. Norton, which said supposed judgment, which has not the force of the thing adjudged in such other jurisdiction and upon said amended petition, cannot in any manner bind these respondents by a decree in rem against steamboat Frolic, nor decree any privilege in such suit upon said steamer, binding upon these respondents.

Therefore these defendants pray that said demand may be rejected and for their costs.

(Signed) A. G. BRICE, RACE,
FOSTER & E. T. MERRICK,
Of Counsel.

Peremptory exception.—Filed December 5th, 1870.

ED. A. SWITZER
vs.
MRS. M. ZELLER ET AL. } No. 3878.

Hon. Don A. Pardee, judge of the second judicial district court, parish of Jefferson, La.:

In this case the defendants, peremptorily excepting, plead in bar of plaintiff's demand, that the said supposed judgment against said E. E. Norton, assignee, is absolutely null and void because not rendered against the said Heinn and wife, and because said assignee has no right to stand in judgment for them, and because the said fifth district
8 court had no jurisdiction, right, or power to render judgment against an assignee in bankruptcy appointed by the district court of the United States, sitting in bankruptcy, for the supposed causes for which said supposed judgment has been rendered. Wherefore defendants pray that this peremptory exception be maintained and this suit dismissed at the cost of plaintiff, and for all general and equitable relief.

(Signed) A. G. BRICE, RACE,
FOSTER, & E. T. MERRICK,
For Defendants.

Order.

Let this peremptory exception be filed as prayed for and according to law.

Carrollton, Dec'r 5th, 1870.

(Signed) DON A. PARDEE,
Judge Second Judicial District of Louisiana.

Extract from the minutes of December 5th, 1870.

MONDAY, *December 5th*, 1870.

District court met pursuant to adjournment, Don A. Pardee, judge.

On motion of A. G. Brice, Race, Foster and Merrick, of counsel for defendants, the peremptory exception filed herein this day is fixed for trial on Saturday, December 10th, 1870.

Note of evidence.—Filed December 10th, 1870.

Second judicial district court, parish of Jefferson.

ED. A. SWITZER
vs.
MRS. M. A. ZELLER ET AL. } No. 3878.

Present, A. G. Brice, attorney for defendant and plaintiffs in exception.

Plaintiffs in exception and defendant in suit offers in evidence the entire record of the fifth district court, No. 16926, entitled "E. A. Switzer vs. Steamboat Frolic," said suit being originally No. 2880 of the docket of the second judicial district court. The ex-parte motion of October 3d, 1870, is not a part of this record as offered in evidence.

9 Evidence closed. December 10th, 1870.

(Signed) H. L. BURNS, *Clerk.*

Extract from the minutes of December 10th, 1870.

SATURDAY, *December 10th*, 1870.

District court met pursuant to adjournment, Don A. Pardee, judge.

This case fixed for trial to-day was called—present A. G. Brice, attorney for defendant—when, after hearing the argument of counsel, the case was taken under advisement by the court, and leave granted to plaintiff's counsel to file briefs.

Judgment.—Rendered December 24th, 1870.

Second judicial district court, parish of Jefferson.

EDGAR A. SWITZER
vs.
MRS. MAGDALENA A. ZELLER ET AL. } No. 3878.

In this case, submitted by counsel on the entire record of this court and the fifth district court on the exceptions filed, considering the 1st, 2d, and 21st sections of the bankrupt law and the case of Payne Bros. vs. Abel et. al., Warren circuit court Kentucky, and the case of Lewis vs. Fisk, 6th Robinson 159—

It is ordered, adjudged, and decreed that the exception herein be maintained and suit dismissed at plaintiff's costs. Judgment rendered December 24th, 1870, and signed May 18th, 1871, for January 2d, 1871, nunc pro tunc.

(Signed.) DON A. PARDEE,
Judge Second Judicial District of Louisiana.

Petition for appeal.—Filed May 18th, 1871.

Second judicial district court for the parish of Jefferson.

EDGAR A. SWITZER
vs.
MRS. M. A. ZELLER ET AL. } No. 3878.

The petition of Edgar A. Switzer, plaintiff in the above cause, respectfully represents that he is advised and believes there is error to his

prejudice in the final judgment rendered in above cause by this
10 hon. court on the 24th day of December, 1870, and signed on the 18th of May, 1871, for January 2d, 1871, nunc pro tunc, and that he is desirous of taking an appeal from said judgment to the supreme court of Louisiana. Wherefore petitioner prays that he be allowed an appeal from said judgment, returnable in the supreme court on the first Monday of November, 1871, upon giving bond and security in the sum of two hundred dollars, and that the defendants in the above case, to wit, Mrs. Magdalena Zeller, widow in community of F. C. Zeller, individually and as natural tutrix of any representing her daughter, Henrietta Zeller, minor heir of F. C. Zeller; C. J. Zeller, George Zeller, Louis Zeller, and Magdalena, wife of P. Betz, major heirs of F. C. Zeller, and P. Betz, husband of said Magdalena Zeller, be cited to appear and answer this appeal, and pet'r prays for general relief.

(Signed) B. EGAN & E. N. WHITTEMORE, *Attorneys.*

Order.

Let an appeal be granted herein as prayed for and according to law upon appellants furnishing bond with good and solvent security in the sum of two hundred dollars, conditioned as the law directs, returnable in the supreme court of Louisiana, on the first Monday of November, 1871.

(Signed) DON A. PARDEE, *Judge.*

Service accepted.

Service accepted and citation waived.

(Signed) E. T. MERRICK AND A. G. BRICE,
Attorneys for Defendants.

Bond of appeal.—Filed May 18th, 1871.

Know all men by these presents that we, Edgar A. Switzer, as principal, and A. A. Woods, as surety, are held and firmly bound unto H. L. Burns, the clerk of the second judicial district court in and for the parish of Jefferson, his executors, administrators, and assigns,
11 in the sum of two hundred dollars, for the payment whereof we bind ourselves, our heirs, executors, and administrators, firmly by these present, sealed with our seals and dated in the parish of Jefferson on this 18th day of May, in the year of our Lord one thousand eight hundred and seventy-one.

Whereas the above bounden Edgar A. Switzer this day filed a petition of appeal from a final judgment rendered against him in the suit of Edgar A. Switzer vs. Mrs. Magdalena Zeller et al., No. 3878, in the second judicial district court in and for the parish of Jefferson, Louisiana, on the 24th day of December, 1870, and signed on the 18th May, 1871, for January 2d, 1871, nunc pro tunc:

Now the condition of the above obligation is such that the above bound Edgar A. Switzer shall prosecute his appeal, and shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the proceeds of the sale of his estate, real or personal, if he be cast in the appeal; otherwise that the said A. A. Woods, his surety, shall be liable in his place.

(Signed) EDGAR A. SWITZER.
(Signed) A. A. WOODS.

Signed, sealed, and delivered in presence of—

Citation of appeal.—Filed September 8th, 1871.

STATE OF LOUISIANA,
District Court, Parish of Jefferson:

EDGAR A. SWITZER
vs.
MRS. M. A. ZELLER ET AL. } No. 3878.

To Mrs. Magdalena Zeller et. al., greeting:

Whereas Edgar A. Switzer has, on the 18th day of May, 1871, filed in the office of the district court in and for Jefferson Parish, a petition of appeal from a certain final judgment rendered in the said court against him, which appeal is returnable in the supreme court for the State aforesaid on the 1st Monday of November, 1871: You are therefore hereby cited to appear in person or by attorney in the said court, on the day last aforesaid, to answer the said appeal.

Witness the Hon. Don A. Pardee, judge of the court aforesaid, this sixth day of September, in the year of our Lord 1871.

(Signed) H. L. BURNS, *Clerk.*

12 *Sheriff's return.—Filed September 8th, 1871.*

Received September 7th, 1871, and on the 14th day of said month and year I served a copy of the within citation of appeal on Magdalena Zeller in person.

(Signed) J. GERBER,
Deputy Sheriff, Parish of Jefferson.

Record No. 16926 of the fifth judicial district court, parish of Orleans, filed in evidence in this suit, No. 3878 of the second judicial district court, parish of Jefferson, on the 10th day of December, 1870, the same being formerly suit No. 2880 of the second judicial district court, parish of Jefferson.

Petition.—Filed August 31st, 1866.

To the hon. the second judicial district court in and for the parish of Jefferson:

The petition of Edgar A. Switzer, a resident of , respectfully represents that the steamboat Frolic and owners, Mary Heinn and husband, John Heinn, residing in this State, are justly and truly indebted to your pet'r in the full sum of eight hundred and seventy dollars, with legal interest from the 6th of March, 1866, for services rendered as captain and superintendant of the repairing said steamboat Frolic, from the 9th of December, 1865, to the 6th of March, 1866, say two months and 27 days, at the rate of $300 per month, all of which will more fully appear by reference to the detail bill, annexed and made part hereof.

Petitioner further represents that said boat as engaged in carrying freight and passengers for hire; that he is a privileged creditor of said boat for the said sum of $870, with interest as aforesaid, and said boat is on the eve of leaving the jurisdiction of this hon. court, and he is apprehensive of losing the amount of his said claim should said boat depart previous to the same being satisfied.

Petitioner further represents that the owners of said boat have

13 repeatedly promised to pay the amount of his said claim, yet have failed and neglected so to do.

Wherefore petitioner prays that, in consideration of the premises, the affidavit annexed, that a writ of provisional seizure do issue against said steamboat Frolic, and that Mary Heinn, and husband, John Heinn, owners of said boat, be cited to appear and answer this petition, and that, after due proceedings had, they be condemned in solido to pay petitioner the aforesaid sum of eight hundred and seventy dollars, with legal interest from the 6th of March, 1866, and with privilege on the steamboat Frolic, and all costs of suit; and petitioner prays for general relief.

(Signed) BENTINCK EGAN, *Attorney.*

E. A. SWITZER, being duly sworn, doth depose and say that the steamboat Frolic & owners, Mary Heinn and husband, John Heinn, are justly and truly indebted to affiant in the full sum of eight hundred and seventy dollars for services rendered on said boat; that the same is really owing, and that the said vessel is on the eve of leaving the jurisdiction of this honorable court, and he is apprehensive of losing the amount of his said claim should said boat depart previous to the same being satisfied; and that all the facts and allegations in the foregoing petition are true and correct.

(Signed) E. A. SWITZER.

Sworn to and subscribed before me this 31st August, A. D. 1866.

(Signed) CHAS. A. LAGRUE,
Deputy Clerk.

Bill for services.—Filed August 31st, 1866.

NEW ORLEANS, *March 6th*, 1866.

Steamboat Frolic and owners, Mary Heinn & husband, John Heinn to E. A. Switzer, Dr.

For services as captain and superintendent of the repairing of the steamboat Frolic from 9th December, 1865, to 6th March, 1866, say 2 months & 27 days, at $300 per month..... $870 00

14 *Order.*

Let, as prayed for, a writ of provisional seizure issue according to law.

Parish of Jefferson, August 31st, 1866.

(Signed) ROBERT MORRIS, *Clerk.*

Order.

It is ordered that the amount of the bond to release the property seized be fixed at fifteen hundred dollars.

Parish of Jefferson, Sept'r 4th, 1866.

(Signed) ROBERT MORRIS, *Clerk.*

Citation.—Filed December 13th, 1867.

THE STATE OF LOUISIANA,
Parish of Jefferson:

Second judicial district court.

E. A. SWITZER
vs.
ST'B'T FROLIC, MARY HEINN & HER HUSBAND, John Heinn. } No. 2880.

Mrs. Mary Heinn, owner of the steamboat Frolic:

You are hereby summoned to comply with the demand contained in the petition, of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the second judicial district court, in the parish of Jefferson, in ten days after the service hereof.

Witness the Hon. A. Cazabat, judge of the said court, this 1st day of Sept., in the year of our Lord 1866.

(Signed) ROBERT MORRIS, *Clerk.*

Sheriff's return.

Received Sept'r 1st, 1866, and on the same day of same month and year served a certified copy of the within citation and accompanying petition on the defendant Mary Heinn, in person.

(Signed) E. R. CHEVALLEY,
Deputy Sheriff.

Citation on John Heinn.—Filed Dec'r 13th, 1866.

THE STATE OF LOUISIANA,
Parish of Jefferson:

15 Second judicial district court.

E. A. SWITZER
vs.
ST'B'T FROLIC VS. MARY HEINN & HUSBAND, John Heinn. } No. 2880.

Mr. John Heinn, owner of steamboat Frolic:

You are hereby summoned to comply with the demand contained in the petition, of which a copy accompanies this citation, or deliver your answer to the same, in the office of the clerk of the second judicial district court, in the parish of Jefferson, in ten days after the service hereof.

Witness the Hon. A. Cazabat, judge of the said court, this 1st day of Sept., in the year of our Lord 1866.

(Signed) ROBT. MORRIS, *Clerk.*

Consent to transfer.—Filed Dec. 13th, 1866.

E. A. SWITZER
vs.
ST'B'T FROLIC & OWNERS, MARY HEIN AND husband, John Heinn. } No. 2880.

We hereby consent that the above cause be transferred to the hon.

the fifth district court of New Orleans, to be there proceeded with according to law, and as if the same had been filed in said court in the first instance.

(Signed) BENTINCK EGAN,
Attorney for Plaintiff.

(Signed) M. GRIVOT,
Attorney for Defendant.

Bond releasing steamboat Frolic from provisional seizure.—Filed Sept'r 4th, 1866.

Know all men, that we, John Heinn and F. C. Zeller, are held unto S. Kerner, sheriff of the parish of Jefferson, in the State of Louisiana, in the penal sum of fifteen hundred dollars, for the payment whereof to the said S. Kerner, his executors, administrators or assigns, we jointly and severally bind ourselves, our heirs, executors, administrators or assigns, respectively by these presents, as witness our respective names hereto affixed. Parish of Jefferson, this 4th day of September, in the year 1866.

Whereas, in and by virtue of a writ of provisional seizure, issued out of the hon. the second judicial district court of Louisiana, at the
16 suit of E. A. Switzer vs. st'b't Frolic & owners, John Heinn & Mary Heinn, and numbered 2880 on the docket of the said court, and which suit is now pending therein, the following described property, to wit, the steamboat Frolic, has been seized and taken into custody of the said sheriff and detained according to law, but the same has been released and delivered to the defts., by order of court, upon the appearance of the defendants in the said suit, and delivering to the said sheriff the present obligation; the condition of which is such that if the said defendants shall not send the above-described property out of the jurisdiction of the court, and that he will faithfully present the same in case he should be decreed to restore the same to the plaintiff, and shall satisfy such judgment as may be rendered in the suit pending as above mentioned, then this obligation to be void, or else remain in full force.

(Signed) J. HEINN.
" P. C. ZELLER.

Signed and delivered in presence of—
E. R. CHEVALLEY.

Endorsement on the reverse of the above bond is the following: Transferred to plaintiff, E. A. Switzer, nunc pro tunc.

(Signed) AMOS S. COLLINS,
Sheriff.

Par. of Jefferson, Oct. 5th, 1870.

Answer 5th, D. C. Filed Dec. 13, '66, *& 2d D. C. Filed October* 29, 1866.

EDGAR A. SWITZER
vs.
ST'B'T FROLIC & MARY HEINN & HUSBAND. } No. 2880.

Second judicial district court.

Now, into court comes Mary Heinn and John Heinn, defendants in this suit, and plead to the jurisdiction of this court, because these defend-

ants reside in the parish and city of New Orleans, and out of the jurisdiction of this court, & the proceedings instituted before this court are not proceedings in rem., but proceedings against the persons of these defendants, and against whom a personal judgment is prayed for.

17 2d. They except and say that plff. cannot proceed by provisional seizure, because the services for which he claims payment does not arise whilst the steamer Frolic was navigating within the State, or trading within the State, but at a time when she was not navigating or trading within the State. That the provisional seizure is allowed only to parties who have rendered services, trading or navigating within the State. Art. 285, No. 3, & 289, C. P. Prays to be hence dismissed with costs.

(Signed) M. GRIVOT,
Atty. for Petr.

Rule to set aside provisional seizure.—Filed December 17th, 1866.

Fifth district court.

E. A. SWITZRR
vs.
ST'B'T FROLIC, MARY HEINN & HUSBAND.

On motion of M. Grivot, of counsel for defendant in this case, ordered that plaintiffs show cause, on Wednesday January 9th, at 11 o'clock a. m., why the provisional seizure issued in this case should not be set aside on the following grounds:

1st. That plaintiff, according to his own showing, has no privilege; that at the time *of* the alleged services, as he states, were being rendered, the st'b't Frolic was not navigating or trading within or without the State, and therefore no provisional seizure can issue against said steamboat; the Arts. 285 & 289, C. P., being imperative.

2d. That, if the plaintiff be entitled to the writ of provisional seizure, he is only entitled to it for a claim within the six months previous to the application for said, and not for any sum beyond, or anterior to the six months.

3d. That he claims from the 9th Decr., 1865, to the 6th March, 1866, for services rendered during that time, and he brings suit on the 31st August, 1866.

Therefore his privilege, if he had one, could not be for more than one month's services, and therefore the court issued erroneously for more.

Answer.—Filed December 17th, 1866.

Fifth district court.

18 E. A. SWITZER
vs.
S. B. FROLIC ET AL.

Now come defendants in this suit, and for answer, deny all and singular plaintiff's allegations, and deny that John Heinn was ever owner of said boat, and further deny that plaintiff has any privilege on said boat for any work or services, or that he ever rendered services as charged, and require strict proof in regard thereto. Pray judgment in their favor for costs.

(Signed) M. GRIVOT,
Atty. for Defts.

Rule to shew cause.—Filed Decr. 21st, 1866.

STATE OF LOUISIANA:
Fifth district court of New Orleans, the 17th day of December, 1866.
Present, the Hon. Chs. Leaumont, judge.

E. A. SWITZER
vs.
ST. BT. FROLIC, MARY HEINN ET AL. } No. 16926.

On motion of M. Grivot, of counsel for defendant in this case, ordered that plff. shew cause, Wednesday, January 9th, at 11 o'clock a. m., why the provisional seizure issued in this case should not be set aside on the following ground:

1st. That plff., according to his own shewing, has no privilege; that at the time *of* the alleged services, as he states, were being rendered, the steamboat Frolic was not navigating or trading within or without the State, and therefore no provisional seizure can issue against said steamboat, the arts. 285 & 289 c. p. being imperative.

2d. That if the plaintiff be entitled to the writ of provisional seizure, he is only entitled to it for a claim within the six months previous to the application for said, & not for any sum beyond or anterior to the six months.

3d. That he claims from the 9th Decr., 1865, to the 6th March, 1866, for services rendered during that time, and he brings suit on the 31st August, 1866; therefore his privilege, if he had any, could not be for more than one month's services, and therefore the court issued erroneously for more.

A true copy.
(Signed) A. D. BERNOUDY, *Dy. Clerk.*

19 *Receipt and service.*

Received Decr. 20th, 1866, and on the 21st day of the same month and year served a copy of the within rule on B. Egan, esqr., personally. Returned same day.
(Signed) F. B. HEMARDS,
Deputy Sheriff.

Supplemental petition.—Filed Decr. 26th, 1866.

E. A. SWITZER
vs.
ST. BT. FROLIC & OWNERS, JOHN HEINN & WIFE. } No. 16926.

To the hon. the fifth district court of New Orleans:

The supplemental and amended petition of E. A. Switzer, plaintiff in the above cause, respectfully represents that petitioner omitted to state in his original petition that one of the defendants in the above suit, John Hilton, and who acts as the agent and manager of the business of the boat, had given petitioner a note, payable four months after date, for the sum of eight hundred and seventy dollars, dated on the 6th of March, 1866, as an acknowledgement of his services as captain and superintending the repairs of the steamboat Frolic, as stated more fully n his bill annexed to the original petition in this cause, and that he is

now desirous of filing said note, and making it part of his original and this supplemental petition.

Wherefore petitioner prays that this supplemental petition and note be filed, and that John Heinn and wife, Mary Heinn, be cited to appear and answer, and that after due proceedings had, they be condemned in solido to pay petitioner the said sum of eight hundred and seventy dollars with legal interest from the 6th of March, 1866, and with privilege on the steamboat Frolic, and also costs of suits, and petr. prays for general relief.

(Signed) BENTINCK EGAN,
Attorney.

Order.

Let this supplemental petition be filed as within prayed for, and according to law.

New Orleans, Dec. 26th, 1866.

(Signed) PAUL E. THEARD,
20 *Judge, Acting for Judge Leaumont, Fifth District Court.*

Note.—Filed Dec. 26th, 1866.

$870.00.] NEW ORLEANS, *March 6th*, 1866.

Four months after date, I promise to pay to E. A. Switzer or bearer the sum of eight hundred and seventy dollars, for value received.

(Signed) J. HEINN.

Testimony.—Filed Decr. 26th, 1866.

Fifth district court.

E. A. SWITZER
vs.
ST. BT. FROLIC ET AL. } 16926.

Plaintiff offers in evidence the note sued on, filed Decr. 26th, 1866.

R. P. MCQUEN for plaintiff says:

I am acquainted with the parties in this suit, Capt. Sweitzer vs. Capt. Heinn. I was employed on the steamboat Frolic as engineer. Capt. Heinn and Captain Switzer both employed me. I was employed on her from some time in December until July. Captain Switzer was acting on the boat as superintendant; he gave orders, made bills and paid me my money up to the last February. He was not on the boat all the time I was. He went ashore about the first of March. I did not leave the boat till about the 25th July. I am not positive about the exact date. During the time Switzer was on her, the boat was being repaired. I don't think Captain Heinn directed the repairs. Captain Heinn would come to the boat occasionally, and look about. I don't know the tenor of his conversation with Captain Switzer—all the conversation I heard between them was Capt. Heinn said the boat would make a good boat, but cost a heap of money. Captain Switzer came on the boat about the same time I did. I am not positive of the time he came—however, he may have come on earlier than Decr. I did not charge my memory with the time. Switzer paid me my money.

I don't recollect exactly what he paid me. My salary was two hun-
21 dred dollars per month. I should think he paid me as much as three hundred dollars. I don't know the amount, however. The

second engineer and two strikers and some other laborers, I think, he also paid, but he did not pay them the full amount.

Citation to supplemental petition.

Fifth district court of New Orleans, in the city of New Orleans.

O. A. SWITZER
vs.
ST'B'T FROLIC & OWNERS. } No. 16926.

Mr. John Heinn, & wife, Mary Heinn:

You are hereby summoned to comply with the demand contained in the supplemental petition, of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the fifth district court of New Orleans, in ten days after the serviee hereof.

Witness the Hon. Chas. Leaumont, judge of the said court, this 27th day of December, in the year of our Lord 1866.

(Signed) W. F. A. LUMINAIS,
Deputy Clerk.

Service of the supplemental petition.

Received, Dec. 27, 1866, and on the 31st same month and year served copy of within citation and accompanying supplemental petition on John Heinn & wife, by leaving the same at his domicile, No. 386 Annunciation street, in the hands of Josephine Caroline, a person apparently above the age of 14 years, living & residing in said domicile, defts. being absent at the time of said service. Returned same day.

(Signed) R. E. GARDETTE,
Deputy Sheriff.

Exception to supplemental petition.—Filed January 5, 1867.

Fifth district court.

E. A. SWITZER
vs.
ST'B'T FROLIC ET AL.

Now come defendants in this suit, and for exception to the supplemental petition of plff., because the same alters the demand and makes it a different one from that of the original petition, and shews that plaintiff's claim, as stated in the original petition, has been novated by the taking of a note, and that plaintiff cannot amend, but must either proceed with his original action or dismiss the same. Wherefore
22 prays that the supplemental and amended petition be dismissed, and as in duty bound.

(Signed) M. GRIVOT,
Of Counsel.

Supplemental and amended answer to original petition, and answer to supplemental petition.—Filed January 28, 1867.

Fifth district court, parish of Orleans.

E. A. SWITZER
vs.
ST'B'T FROLIC ET AL.

Now comes Mrs. Mary Heinn, one of the defendants in this suit, who,

for supplemental and amended answer to the plaintiff's original petition, and answer to the supplemental petition, says that she denies being indebted as charged, or that the note annexed to the supplemental petition was given as an evidence of debt, but aver' that said note was given by said John Heinn to the plaintiff, as a novation, and in payment of the original debt, and which plaintiff acknowledged to have received. Wherefore defendants plead novation of the original debt, and pray to be hence dismissed with costs; and as in duty bound.

(Signed) M. GRIVOT,
Atty. for Defendants.

Document (sign A.)—Filed April 22d, 1867.

Fifth district court.

ED. SWITZER
vs.
ST'B'T FROLIC. } No. 16926.

Defendant, Mrs. Mary Heinn, herein pleads payment of any claim plaintiff may have made out against her—the sum of four hundred dollars—as per receipt hereto annexed.

(Signed) M. GRIVOT,
For Defendant, Mrs. M. Heinn.

Document.—Filed April 22d, 1867.

$400.00.

Recd., New Orleans, February 28, '66, of Captain John Heinn, the sum of four hundred dollars, on account of wages.

(Signed) E. A. SWITZER.

Fifth district court.

E. A. SWITZER
vs.
STEAMER FROLIC & OWNERS. } No. 16926.

23 On motion of B. Egan, atty. for plaintiff, it is ordered by the court that defendant do shew cause, Monday, 20th January, 1868, why a new trial should not be granted in the above cause, on the ground that the judgment is contrary to the law and the evidence on file, and on the further ground that this court has jurisdiction of this suit.

Received, January 15, 1868, and on the same day, month, and year, served a copy of the within rule on defendant, through his atty, M. Grivot, esqr., personally. Returned same day.

(Signed) F. R. HERNANDEZ,
Deputy Sheriff.

Original and amended answer of John Heinn to original petition and answer.—Filed January 28, 1867.

Fifth district court.

E. A. SWITZER
vs.
ST'B'T FROLIC. } No. 16926.

Defendant, John Heinn, for answer to original and supplemental peti-

tion, says that he denies being the owner of the steamboat Frolic, or that the annexed note was given as an evidence of debt, and says that it was given as a novation of the primitive debt, and which plaintiff prays for judgment in his favor.

(Signed) M. GRIVOT,
Attorney for Defendant.

Peremptory exception of defendants.—Filed June 11th, 1867.

5th dist. court.

E. A. SWITZER
vs.
ST'B'T FROLIC ET AL. } No. 16926.

Now comes the defendant, and for peremptory exception pleads that this suit is against a steamboat, and that the United States district court, sitting in admiralty, has exclusive jurisdiction of such causes, pray' to be hence dismissed with costs.

(Signed) M. GRIVOT,
Atty. for Defendant.

Testimony.—Filed November 9th, 1867.

24 Fifth district court.

E. A. SWITZER
us.
STEAMBOAT FROLIC & OWNERS. } No. 16926.

Testimony of E. A. SWITZER, taken by order of court in the clerk's office:

I am the plaintiff in this suit. I reside in St. Louis. I arrived here on Thursday night last. I came down for the express purpose of attending to this suit. I have no other business here. I expect to leave when this thing is settled. I will not remain until the 18th inst. I cannot now get away before Monday. The bill annexed to my petition in this suit is correct in date and amounts. It is for my services for superintending the repairing of the steamboat Frolic. Captain John Heinn, one of the defendants, employed me at $300 per month. He first employed me at Cairo as captain of a boat he bought at that place; this was the Jatan. This took place about the 18th of August, 1865, I think. I brought this boat down to this city, and, shortly afterwards, went on the steamboat Frolic, at the request of Captain John Heinn. The Frolic was then laying at the wharf. I took her from there to the dock, on the other side of the river, where she continued undergoing extensive repairs, where she until the 6th of March, 1866. The receipt marked "A" is correct. I received the money, $400, therein mentioned, on the 28th February, 1866, from Capt. John Heinn. After that we had a settlement, and there was found to be due me $870, in acknowledgment of which Capt. John Heinn gave me the note marked "B" for the balance due me for my services on the steamboat Frolic. The receipt for $400 is on account of my services on the steamboat Frolic.

No cross-examination.

E. A. SWITZER.

(Signed) M. GRIVOT,
Attorney at Law.

Sworn to and subscribed before me on this 9th day of Nov'r, 1867.
(Signed) F. A. WOOLEY, *Clerk.*

Motion to make E. E. Norton, esqr., assignee, a party to suit.—Filed April 7th, 1870.

(See page over.)

25 *Motion for new trial.—Filed January 13th*, 1868.

On motion of B. Egan, attorney for plaintiff, it is ordered by the court that defendants do shew cause, Monday, 20th January, 1868, why a new trial should not be granted in the above cause, on the ground that the judgment is contrary to the law and the evidence on file, and on the further ground that this court has jurisdiction of this suit.

Motion to make E. E. Norton, esq., assignee, a party to suit.—Filed April 7th, 1870.

Fifth district court.

E. A. SWITZER
vs.
ST. FROLIC & OWNERS, MRS. M. HEINN AND husband, John Heinn.

On motion of B. Egan, atty. for plaintiff in the above cause, and on suggesting to the court that, since the institution of this suit, Mary Heinn & her husband, John Heinn, the defendants, have taken the benefit of the United States bankrupt-act, and that E. E. Norton, esqr., was appointed and qualified as their assignee, therefore it is ordered by the court that E. E. Norton, esq., assignee of defendants, be made a party to this suit.

A true copy.
(Signed) F. A. LUMINAIS,
D'y Clk.

Service.

Received April 8th, 1870, and, on the 9th day of the same month and year, served copy of within motion on E. E. Norton, assignee, &c., in person. Returned same day.
(Signed) P. AD. FORTIER,
D'y Sh'ff.

Note of evidence.—Filed April 22d, 1870.

E. A. SWITZER
vs. No. 16926.
ST'B'T FROLIC.

Plaintiff offers in evidence the note sued on, the testimony of E. A. Switzer filed Nov. 9th, 1867, also testimony filed April 27, '67.

Judgment.—Rendered April 22d, 1870.

26 This cause came on this day for trial; B. Egan, for plaintiff;

E. E. Norton, assignee of Mary Heinn and her husband, John Heinn, the defendants, absent and not represented; when, after hearing evidence, the law and the evidence being in favor of the plaintiff, it is ordered, adjudged, and decreed that the plaintiff, E. A. Switzer, recover of E. E. Norton, assignee of the defendants, Mary Heinn and her husband, John Heinn, the sum of eight hundred and seventy dollars, with legal interest, from the 6th of March, 1866, until paid, and costs of suit, with privilege on the steamboat Frolic.

Judgment rendered April 22d, 1870.

Signed April 28th, 1870.

(Signed) CHAS. LEAUMONT, *Judge.*

Motion to transfer bond.—Filed October 4th, 1870.

Fifth district court for the parish of Orleans.

E. A. SWITZER
vs.
ST'B'T FROLIC & OWNERS. } No. 16926.

On motion of B. Egan & E. N. Whittemore, attys. for plaintiff, and on suggesting to the court that, since the execution of the bond given in above cause, in favor of S. Kerner, sheriff of the parish of Jefferson, for the release of the steamboat Frolic from a provisional seizure, the said sheriff has died, therefore it is ordered by the court that said bond be transferred to plaintiff by the present successor in office of said Sheriff Kerner.

A true copy.

(Signed) AD. DUPRÉ, JR.,
D'y Clk.

Rule to set aside appeal.—Filed October 9th, 1871.

Hon. second jud. dist. court, parish of Jefferson.

EDGAR SWITZER
vs.
MRS. MAGDALENA ZELLER. }

On motion of Race, Foster & E. T. Merrick, of counsel for defendant herein, it is ordered that plaintiff show cause, on Monday, October 16th, 1871, at 10 a. m., why the appeal taken by them herein should not be dismissed on the grounds following, to wit:

27 1st. That the bond is not such in form and amount as the law requires.

2d. That the surety on the bond is not good and solvent.

3d. That the surety is not such as the law requires, and is incompetent to sign as surety.

(Signed) DON A. PARDEE, *Judge.*

Service.

On the 18th day of October, 1871, served a copy of the within rule on Messrs. Whittemore and Egan, by personal service on B. Egan. Returned same day.

(Signed) J. A. MEILLEUR,
Dy. Shff.

After due and diligent search and enquiries, I could not find the plaintiff herein. Returned Oct. 14th, 1871.

(Signed) J. A. GANDOLFI,
Dy. Shff., Parish of Orleans.

Trial of rule.

MONDAY, *October 16th*, 1871.

EDGAR SWITZER
vs. } No. 3878.
MRS. M. ZELLER.

District court met in chambers, Hon. Don A. Pardee, judge.
The rule herein was called, present Foster, counsel for plaintiff in rule, when the rule was continued till Monday, October 23d, 1871, at 10 a. m.
A true copy.

H. L. BURNS, *Clerk.*

Note of evidence.

MONDAY, *October 23d*, 1871.

EDGAR SWITZER
vs. } No. 3878.
MRS. M. ZELLER.

District court met in chambers, Don A. Pardee, judge.
The rule herein was called, present Foster, atty. for plff. in rule, and J. Whittemore, for defendant in rule, when
W. WOODS, security on the appeal bond, being sworn, deposed and said: I signed this bond. I am *with* the sum of two hundred dollars over and above my debts.

Cross-examined:

28 I reside at 121 Carondelet street, New Orleans. I am clerk in Boffingers & Brigneys. My property consists of cash funds in U. S. currency. I have no real estate nor personal effects. I have upwards of $3,000 *dollars* in cash; no U. S. bonds. I have $150 worth of street R. R. stock. I have about $1,800 worth of debts. I have $3,000 beside what I owe. I have about $5,000 in all, endorsed paper, &c. I have $3,000 on deposit in mercantile houses. I am not a married man, have never been married, nor have I been tutor to minor children. I am on two or three small bonds similar to this not exceeding $500. I am not on any minor's, tutor's, nor administrator's bond. I am permanently located in New Orleans.
Evidence closed Oct. 23d, 1871.

H. L. BURNS, *Clerk.*

Judgment on rule.

Considering the law and the evidence, it is ordered by the court that the rule be discharged.
Judgment rendered October 23d, 1871.
A true copy.

H. L. BURNS,
Clerk 2d Jud. District Court, Par. Jefferson.

THE STATE OF LOUISIANA,
Second Judicial District Court, Parish of Jefferson:

I, the undersigned clerk, do hereby certify that the foregoing fifty-eight pages contain a full, complete, and correct transcript of all the documents filed, of all the proceedings had, and of all the evidence adduced in this court, in the cause entitled Edgar A. Switzer vs. Mrs. M. A. Zeller, and numbered 3878 of the docket of this honorable court.

In testimony whereof I have herewith set my hand and affixed the seal of the said court, on this the 30th day of October, in the year of our Lord one thousand eight hundred and seventy-one, and of the Independence of the United States of America the ninty-sixth.

[SEAL.] (Signed) H. L. BURNS,
Clerk Second Judicial District Court in and for the Parish of Jefferson, Louisiana.

29 PROCEEDINGS HAD IN THE SUPREME COURT OF THE STATE OF LOUISIANA.

Transcript of appeal.—(Filed Nov. 4th, 1871.)

(Signed) M. P. JULIAN,
Depy. Clerk.

Cause submitted.—"Minutes."

THURSDAY, *May* 7, 1874.

The court was duly opened. Present, their honors John T. Ludeling, chief-justice, James G. Taliaferro, Rufus K. Howell, William G. Wyly, Philip H. Morgan, associate justices.

EDGAR A. SWITZER
vs. } No. 3508.
MRS. M. A. ZELLER.

This case was called for trial, and having heard argument from E. T. Merrick, esq., of counsel for defendant and appellee, the court took the same under advisement upon the briefs now on file.

Judgment.—"Minutes."

MONDAY, *May 25th*, 1874.

The court was duly opened pursuant to adjournment, present their honors John T. Ludeling, chief-justice, James G. Taliaferro, Rufus K. Howell, William G. Wyly, Philip H. Morgan, associate justices.

His honor the chief-justice pronounced the judgment and decree of the court in the following case:

EDGAR A. SWITZER
vs. } No. 3508.
MRS. M. A. ZELLER.

On appeal from the second judicial district court, parish of Jefferson. It is ordered and adjudged that the judgment of the lower court be set aside; that the exception be overruled; that the case be remanded to be proceeded with according to law, and that the appellee pay costs of appeal.

30 *Opinion of the court.—Filed May* 25, 1874.

E. A. SWITZER
vs.
MRS. M. A. ZELLER ET ALS. } No. 3508.

LUDELING, C. J.:

This suit grows out of a suit of Switzer vs. Steamboat Frolic and Owners, recently decided by this court. In that suit E. A. Switzer obtained a judgment against E. E. Norton, assignee in bankruptcy of the defendants, with a recognition of a privilege on the steamboat, which had been released on bond, with F. C. Zeller as security. The defendants in this suit are his legal representatives, and this suit is to enforce the obligation of said bond.

The defense is that the judgment against Norton, assignee, is absolutely null and void, because not rendered against Heinn and wife, the owners of the Frolic, and the assignee had not the right to stand in judgment for them, and the State court had no jurisdiction to render a judgment against the assignee, &c.

The bankrupts having been discharged, no judgment against them could be obtained, and there is nothing in the bankrupt law which required the discontinuance of suits already commenced. (See Bump's Bankruptcy, p. 186; see also case of E. A. Switzer vs. John Heinn and Mary Heinn, recently decided, and authorities therein cited.)

It is therefore ordered and adjudged that the judgment of the lower court be set aside; that the exception be overruled; that the case be remanded to be proceeded with according to law, and that the appellee pay costs of appeal.

Petition for rehearing.—Filed Nov'r 5, 1874.

Supreme court.

EDGAR A. SWITZER
vs.
MRS. M. A. KELLER ET ALS. } No. 3508.

31 To the hon. the supreme court of Louisiana:

The petition for a rehearing of the defendants respectfully represents that the judgment of this hon. court in this case is based upon the judgment against Emory E. Norton, assignee in bankruptcy (under the laws of the United States) of John and Mary Heinn at the suit of Edgar A. Switzer vs. The Steamboat Frolic and Owners, recently decided by this hon. court, and is virtually an enforcement of that judgment against sureties; that a writ of error, with a supersedeas under the act of Congress in such case made and provided, was allowed to the Supreme Court of the United States, where said writ of error is pending, as is manifest by an inspection of the proceedings before your hon. court in the suit entitled Edgar A. Switzer vs. The Steamer Frolic and Owners, No. 3111 on the docket of this court, to which reference is prayed for greater certainty; that the rendition of a final judgment in this case, which is in the nature of an execution and enforcement of the judgment superseded, is a violation of the supersedeas granted under the laws of the United States.

And petitioners further shew that said Emory E. Norton, as an

assignee in bankruptcy of John and Mary Heinn, has no power conferred upon him as such assignee in bankruptcy under the laws of the United States to represent them in judicial proceedings in personal actions in the State courts other than in the mode pointed out by the acts of Congress in such cases made and provided; and the rendition of the judgment against said Norton, assignee in the said case of Edgar A. Switzer against The Steamboat Frolic and Owners, is in violation of and against the 21st section of the act of Congress approved March 2d, 1867, called the bankrupt act, as well as the other provisions of said act, is null and void as it respects these defendants, and it cannot
32 lawfully be enforced againt them as a valid judgment.

Wherefore these defendants pray that a rehearing may be granted them, and that this cause may be suspended until said judgment superseded can be determined by the Supreme Court of the United States, and for a judgment affirming the judgment of the court below, and for general relief in the premises.

By MERRICK, RACE AND FOSTER,
Of Counsel for Appellees.

Rehearing refused.—Minutes.

FRIDAY, *December* , 1874.

The court was duly opened. Present, their honors James G. Taliaferro, Rufus K. Howell, William G. Wyly, Philip H. Morgan, associate justices; absent, John T. Ludeling, chief-justice.

His honor Justice Taliaferro pronounced the judgment and decree of the court in the following case:

EDGAR A. SWITZER
vs. } No. 3508.
MRS. M. A. ZELLER.

It is ordered that the rehearing applied for in this case be refused.

Writ of error.—Filed Dec'r 14th, 1874.

Copy of a writ of error lodged in the clerk's office of the supreme court of Louisiana, in pursuance of the statute in such cases made and provided, this 14th day of December, one thousand eight hundred and seventy-four.

(Signed) MERRICK, RACE AND FOSTER,
Attorneys of Plaintiff in Error.

UNITED STATES OF AMERICA, *ss:*

33 The President of the United States to the honorable the judges of the supreme court of the State of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in said suit between Edgar A. Switzer, plaintiff, and Mrs. Magdalena A. Zeller, widow in community of F. C. Zeller, deceased, Henrietta Zeller, minor heir of F. C. Zeller, represented by her mother and natural tutrix, said Magdalena A. Zeller, C. J. Zeller, George Zeller, Louis Zeller, and Magdalena Zeller, (wife of P. Betz,) major heirs of said F. C. Zeller, defendants, wherein was drawn in

question the validity of a statute of the United States, and the decision was against its validity; and wherein was also drawn in question a right, privilege, and immunity claimed under the Constitution and statutes of the United States, and authority exercised under the authority, right, privilege, and immunity specially set up and claimed by said defendants aforesaid under such Constitution and statutes of the United States, and authority, a manifest error hath happened, to the great damage of the said Mrs. Magdalena A. Zeller, widow in community of F. C. Zeller, deceased, Henrietta Zeller, minor heir of F. C. Zeller, represented by her mother and natural tutrix, said Magdalena A. Zeller, C. J. Zeller, George Zeller, Louis Zeller, and Magdalena Zeller, (wife of P. Betz,) major heirs of F. C. Zeller, deceased, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme
34 Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court of the United States, this fourteenth day of December, in the year of our Lord one thousand eight hundred and seventy-four.

(Signed) JAMES G. TALIAFERRO,
Senior Associate Justice Supreme Court La., acting as Chief-Justice in place of John T Ludeling, Chief-Justice, absent, Supreme Court of the State of Louisiana.

Bond for writ of error.—Filed Decr. 14, 1874.

Supreme court of La.

Know all men by these presents that we, Mrs. Magdalena A. Zeller, widow in community of F. C. Zeller, Henrietta Zeller, minor, represented by her mother and natural tutrix, Magdalena A. Zeller, C. J. Zeller, Geo. Zeller, Louis Zeller, and Magdalena Zeller, (wife of P. Betz,) major heirs of said F. C. Zeller, deceased, as principal, and William Heyer as sureties, are held and firmly bound unto John M. Howell, clerk of the supreme court of the State of Louisiana, and unto Edgar A. Switzer, the plaintiff, or either of them, in the full and just sum of two hundred dollars, to be paid to the said John M. Howell, clerk as aforesaid, and unto said Edgar A. Switzer, plaintiff, or either of them, their certain attorney, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors,
35 and administrators, jointly and severally, by these*se* presents.

Sealed with our seals and dated this fourteenth day of December, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas lately, at a supreme court of the State of Louisiana, in a suit depending in said supreme court, wherein Edgar A. Switzer is plaintiff, and Mrs. Magdalena A. Zeller, widow in community of F. C. Zeller, deceased, Henrietta Zeller, minor heir of F. C. Zeller, represented

by her mother and natural tutrix, Mrs. Magdalena A. Zeller, C. J. Zeller, Geo. Zeller, Louis Zeller, and Magdalena Zeller, (wife of P. Betz,) major heirs of said F. C. Zeller, deceased, were defendants, judgment was rendered against the said Mrs. Magdalena A. Zeller and others, defendants, and the said Mrs. Magdalena A. Zeller and others, defendants, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said supreme court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Edward A. Switzer, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of October next.

Now the condition of the above obligation is such that if the said Magdalena A. Zeller, widow, &c., Henrietta Zeller, minor, &c., represented by her natural tutrix, &c., C. J. Zeller, George Zeller, Louis Zeller, and Magdalena Zeller, (wife of P. Betz,) heirs of said F. C. Zeller, deceased, the defendants aforesaid, shall prosecute their writ to
36 effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) MERRICK, RACE & FOSTER, [L. S.]
Attys. for Plaintiffs in Error.

(Signed) WILLIAM HEYER. [L. S.]

Sealed and delivered in the presence of—

Approved.

(Signed) JAMES G. TALIAFERRO,
Senr. Associate Justice Sup. Ct. La., acting as Chief-Justice
In the absence of John T. Ludeling, Chief-Justice.

Consent of plaintiff.

Supreme court.

EDGAR A. SWITZER
vs.
MAGDALENA A. ZELLER, WIDOW, etc., et als. } No. 3508.

If a writ of error is allowed to the defendants in this cause, I have no objection to the same being signed by Mr. Justice James G. Taliaferro, acting chief-justice of supreme court of the State of Louisiana, in the absence of the chief-justice, John T. Ludeling, on plaintiffs in error giving bond in the sum of two hundred dollars.

Dec. 14, 1874.

(Signed) BENTINCK EGAN, AND
E. N. WHITTEMORE,
Attys. for Plaintiff.

Filed Dec. 14, 1874.

(Signed) M. P. JULIAN,
Deputy Clerk.

37 *Clerk's certificate.*

STATE OF LOUISIANA,
Supreme Court of the State of Louisiana:

I, John Miller Howell, clerk of the supreme court of the State of

Louisiana, holding sessions at the city of New Orleans, do hereby certify that the foregoing thirty-six (36) pages contain a full, true, and complete copy of the transcript of the proceedings had in the second judicial district court, in and for the parish of Jefferson, in a certain suit, wherein Edgar A. Switzer was plaintiff and Mrs. M. A. Zeller was defendant, and also of all the proceedings had in this supreme court on the appeal taken by said plaintiff, which said appeal is now on the files thereof under No. 3508.

In testimony whereof I have hereunto set my hand and affixed the seal of this honorable court, at the city of New Orleans, this twenty-eighth day of July, in the year of our Lord one thousand eight hundred and seventy-five, and in the hundredth year of the Independence of the United States of America.

[SEAL.] JNO. M. HOWELL,
Clerk.

STATE OF LOUISIANA,
Supreme Court of the State of Louisiana:

I, John T. Ludeling, chief-justice of the supreme court of the State of Louisiana, do hereby certify that John Miller Howell is clerk of the supreme court of the State of Louisiana, holding sessions at the
38 city of New Orleans; that the signature of John Miller Howell to the within certificate is in the proper handwriting of him, the said clerk, that said certificate is in due form of law, and that full faith and credit are due to all of his official acts as such.

In testimony whereof I have hereunto set my hand and seal, at the city of Monroe, this 31st day of July, A. D. 1875.

[SEAL.] JNO. T. LUDELING,
Chief-Justice of the Supreme Court of the State of Louisiana.

Supreme court of the State of Louisiana.

I, John Miller Howell, clerk of the supreme court of the State of Louisiana, holding sessions at the city of New Orleans, do hereby certify that the honorable John T. Ludeling is, and was at the time of signing the foregoing document, presiding judge of our supreme court, and that the signature affixed to the same is in the proper handwriting of him, the said judge.

In faith whereof I have hereunto set my hand and affixed the seal of this honorable court, at the city of New Orleans, this second day of August, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.[JNO. M. HOWELL,
Clerk.

39 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in said suit, between Edgar A. Switzer, plaintiff, and Mrs. Magdalena A. Zeller, widow in community of F. C. Zeller, deceased, Henrietta Zeller, minor heir of F. C. Zeller, repre-

sented by her mother and natural tutrix, said Magdalena A. Zeller, C. J. Zeller, George Zeller, Louis Zeller, and Magdalena Zeller, (wife of P. Betz,) major heirs of said F. C. Zeller, defendants, wherein was drawn in question the validity of a statute of the United States, and the decision was against its validity; and wherein was also drawn in question a right, privilege, and immunity claimed under the Constitution and statutes of the United States, and authority exercised under the authority, right, privilege, and immunity specially set up and claimed by said defendants aforesaid, under such Constitution and statutes of the United States and authority, a manifest error hath happened, to the great damage of the said Mrs. Magdalena A. Zeller, widow in community of F. C. Zeller, deceased, Henrietta Zeller, minor heir of F. C. Zeller, represented by her mother and natural tutrix, said Magdalena A. Zeller, C. J. Zeller, George Zeller, Louis Zeller, and Magdalena Zeller, (wife of P. Betz,) major heirs of said F. C. Zeller, deceased, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief-Justice of the said Supreme Court of the United States, this 14th day of December, in the *the* year of our Lord one thousand eight hundred and seventy-four.

JAMES G. TALIAFERRO,

Sen. Associate Justice Sup. Ct. La., acting as Chief-Justice in place of John T. Ludeling, Chief-Justice, absent, Supreme Court for the State of Louisiana.

(Indorsed:) Supreme court of La. No. 3508 versus . Writ of error. Merrick, Race & Foster, counsel for plfs. in error. Filed Dec. 14th, 1874. M. P. Julian, dy. clk.

40 The United States of America:

The President of the United States to Edgar A. Switzer, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, on the 2d Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana, wherein Mrs. Magdalena A. Zeller, widow in community of F. C. Zeller, deceased, Henrietta Zeller, minor heir of F. C. Zeller, represented by her mother and natural tutrix, said Magdalena A. Zeller, C. J. Zeller, George Zeller, Louis Zeller, and Magdalena Zeller, (wife of P. Betz,) major heirs of said F. C. Zeller, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should

not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable James G. Talliaferro, senior associate justice of the supreme court of the State of Louisiana, acting chief-justice in the absence of the chief-justice, this 14th day of December, A. D. 1874.

JAMES G. TALIAFERRO,
Senr. Associate Justice Sup. Ct. Louisiana,
acting as Chief-Justice in place John T. Ludeling, Chief-Justice, absent.

(Indorsed:) 3508. Supreme court of La. Citation for return.

Service acknowledged.

B. EGAN, &
E. N. WHITTEMORE,
Atty. for Deft. in Error.

Aug. 13, 1875.

Filed Dec. 14th, 1874.

M. P. JULIAN,
Dy. Clk.

(Indorsement on cover:) No. 611. Magdalena A. Zeller, widow of F. C. Zeller, decd., Henrietta Zeller, minor heir, by her tutrix, M. A. Zeller, C. J. Zeller, Geo. Zeller, Louis Zeller, & Magdalena, wife of P. Betz, heirs of F. C. Zeller, decd., plaintiffs in error, vs. Edgar A. Switzer. Louisiana sup. court. Filed 27th September, 1875.

Supreme Court,

OF THE

UNITED STATES.

Mrs. M. A. ZELLER, et als, plaintiffs in error,

vs. 611

E. A. SWITZER, defendant in error.

Brief in behalf of defendant in error on motion to dismiss the writ of error.

The facts of this case, as shown by the record, are that plaintiffs obtained a writ of error from a decree of the Supreme Court of Louisiana, reversing a judgment maintaining an exception filed by them in the Second Judicial District Court in and for the Parish of Jefferson, and remanding the cause to said District Court for further proceedings according to law.

The decree in reference to which the writ of error was sued out is not final. It remands the cause to the lower Court to be tried on the merits. There is no final judgment in a sense which would authorize a writ of error. For when a judgment upon the merits is rendered by the District Court, an appeal will again lie to the Supreme Court of Louisiana. It is clear that in cases of this kind no writ of error can be taken, as this Court has frequently decided.

Moore v. Robbins, 18 Wall. 588.
St. Clair Co., v. Lovingston, 18 Wall. 628.
Tracy v. Holcombe, 24 How. 51.
Brown v. Union Bank, 4 How. 465.
Parcel v. Johnson, lately decided by this Honorable Court.
Pepper v. Dunlap, 5 How. 51.

Respectfully submitted by the defendant in error, who prays that the writ of error herein be dismissed.

JOHN A. GROW,
Attorney for Defendant in Error.

Supreme Court,

OF THE

UNITED STATES.

Mrs. M. A. ZELLER, et als, plaintiffs in error,

vs. 611

E. A. SWITZER, defendant in error.

And now comes the said E. A. Switzer, defendant in error, and moves the Court to dismiss the writ of error herein, upon the ground that the said writ of error is premature and the power of the State Courts over the cause not exhausted, for that the judgment of the Supreme Court of the State of Louisiana, reversing the judgment of the lower State Court, simply overrules the exceptions of plaintiffs in error and remands the cause to be further proceeded in, according to law, by the lower State Court.

Moore v. Robbins, 18 Wall. 588.

St. Clair Co., v. Lovingston, 18 Wall. 628.

Tracy v. Holcombe, 24 How. 51.

Brown v. Union Bank, 4 How. 465.

Parcel v. Johnson, lately decided by this Honorable Court.

Pepper v. Dunlap, 5 How. 51.

Respectfully submitted,

JOHN A. GROW,

Attorney for Defendant in Error.

SUPREME COURT--UNITED STATES.

Mrs. ~~F~~ C ZELLER, et als, Plaintiff. in error,

VS.

E. G. SWITZER, Defendant in error.

611

ON MOTION TO DISMISS.

This case is but a sequel to the suit of Emory E. Norton, assignee, Plaintiff in error, against Switzer, defendant in error, being No. 303 of the docket of this court of the present term. The writ of error in the case of Norton, assignee, vs. Switzer, which we pray the court to refer, it will be perceived on inspection, operates as a supersedeas of the judgdment in that case.

The prosecution of the present suit is an attempt to enforce *the judgment* in that case against the surety on the bond, releasing a provisional seizure, and thus it violates the supersedeas of this high tribunal.

The question under the laws and constitution of the United States was raised before the Supreme Court of the State of Louisiana, as can be seen by an examination of the petition for a rehearing, which under the law of Louisiana, forms a part of the record and pleadings. C P. 912, 171.

This language will be found in the petition for a rehearing: "the rendition of a final judgment, (that is a judgment in that court)" in this case, which is in the

"nature of an execution and enforcement of the judg-
"ment superseded is a violation of the supersedeas
"granted under the laws of the United States. And
"petitioners further shew that the said Emory E. Nor-
"ton, as assignee in bankruptcy of John and Mary
"Heinn, has no power conferred on him as such as-
"signee in bankruptcy to represent them in judicial
"proceedings in personal actions in the State Courts
"other than in the mode pointed out by the act of Con-
"gress in such case made and provided, and the rendi-
"tion of the judgment against said Norton, assignee, in
"said case of Edgar A. Switzer, against the steamboat
"Frolic and owners, is in violation of and against the
"21st Section of the act of Congress, approved March
"2d, 1867, called the Bankrupt act as well as the pro-
"visions of said act and is null and void, as respects
"these defendants and cannot lawfully be enforced
"against them as a valid judgment." Rec.——p. ——
In the case of A. T. Steward vs. Kohn 11 Wal. 495, this court gave the effect to a Louisiana rehearing for which we here contend.

The present case is but an incident as just said of said case of Norton, assignee, vs. Switzer, and this record shows a disregard of the supercedeas by the State Court. Because an attempt to enforce a judgment superseded by a scire facias, or an action of debt, is as much a violation of the supersedeas as the issuance of a fi. fa. So too, an attempt to enforce it against the estate of the surety is as much a violation of it as an attempt against the property of the principal.

As we shall show there is no particular mode prescribed by law, by which this court is required to enforce a

supercedeas ; and while a judgment is awaiting the decision of this court, wherein a supersedeas has been granted parties effected by the violation of the supersedeas must have the right to bring the matter to the attention of this Honorable Court for relief in any reasonable way.

The object in the defendant in error in moving to dismiss the writ of error in this case is to prosecute this suit in disregard of the supersedeas as is seen by the decree he has already obtained in the lower court. The writ of error in this case ought therefore to be retained until the case of Norton, assignee, vs. Switzer, No. 303 is determined. The Plaintiff in error as well as all other parties are protected by the supersedeas from the enforcement of the judgment in that case, and they ought not to be compelled at great trouble to make a formal application for the enforcement of the supersedeas when a comparison of the two decrees show the necessity for it and the retention of this case until the first case is decided, protects the Plaintiffs in error.

We think the fact that this case is but the sequel and branch of the former, and that it appears that no further action under the supersedeas ought to be taken in it, makes it propor that the case should not be dismissed until the former case is decided. The case in this respect differs from the cases cited by the counsel for defendant in error, and shows that it ought to be retained in this court to insure the compliance with the supersedeas which the defendant in error seeks to disregard.

This court has the right to resort to the most convenient remedy to protect its jurisdiction and enforce obe-

dience to its orders of supersedeas. Exparte Milwaukee Rail Road Company 13 Wallace, 189, 190. See also Handeman vs. Anderson 4 H. 640.

The condition of the bond on which suit is brought against the heirs of the surety, Zeller, is "that Heinn and wife will satisfy such judgment as may be rendered "against them (Code of Practice 1870, art. 289,) or return the property."

The judgment meant is a judgment in that case. The judgment therefore which defendant in error seeks to inforce is the said judgment in Norton, assignee vs. Switzer No. 303, which is awaiting the determination of this Honorable Court as to its validity, and under the supersedeas cannot rightfully be enforced by Switzer against sureties or any one until decided.

We therefore pray the court to retain the cause until No. 303, is disposed of. If the defendent in error does not seek to disregard the supersedeas as his counsel has led us to think the retention of the cause will not prejudice him in the least degree. If he does intend to continue to prosecute the suit, it is the duty of this court to arrest his progress which is most easily done in this mode.

E. T. MERRICK,
G. W. RACE,
FOR PLAINTIFF IN ERROR.